Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Communications Assistance	)	CC Docket No. 97-213
for Law Enforcement Act	)	
	)	

COMMENTS

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SUMMARY

The CALEA Section 103 implementation compliance deadline is October 25, 1998. Despite recent publication of an interim trial standard that satisfies CALEA's safe harbor provision, there is no assistance capability final technical industry standard. The FBI has not yet issued its final capacity notice. Given the need for certainty, BellSouth encourages the Commission to act immediately upon CTIA's petition to promulgate by rule the technical standard for CALEA Section 103 assistance capability requirements and grant CTIA's request for an extension of the Section 103 compliance date. In the meantime, the Commission should look favorably on any request for an extension of time for the Section 103 compliance dates that may be forthcoming, and confirm that carrier compliance with recently published interim industry standard J-STD-025 satisfies the "safe harbor" provisions of CALEA § 107.

In its Regulatory Flexibility Analysis, the Commission states that by "providing general guidance regarding the conduct of carrier personnel and the content of records in this NPRM, the Commission permits telecommunications carriers to use their existing practices to the maximum extent possible." Unfortunately, portions of the new rules proposed by the Commission to implement CALEA would result in unnecessary burdens and liabilities, and make unwarranted distinctions between large and small carriers. The Commission should not adopt its proposed rules regarding carrier records and compliance statements. The Commission should clarify that resellers are included in the definition of "telecommunications carrier." The Commission should confirm the industry standard as quickly as possible, encourage the FBI to complete capacity notice proceedings, and take all necessary steps to extend the Section 103 compliance date.

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COMMENTS

BellSouth Corporation,[1] on behalf of its affiliated companies,[2] by counsel, files its comments to the Commission's Notice of Proposed Rulemaking in the above-referenced docket,[3] and specifically new rules proposed by the Commission to implement the Communications Assistance for Law Enforcement Act (CALEA).[4] The scope of the proposed definitions are properly limited by the Commission for the purpose of implementing CALEA, and should generally be finalized as proposed, with the clarification that resellers are included in the definition

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1 BellSouth Corporation (BSC) is a publicly-traded Georgia corporation that holds the stock of companies which offer local telephone service, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide.

2 BellSouth Telecommunications, Inc. (BST), a Bell operating company that provides wireline telephone exchange service and exchange access service in parts of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee, and BellSouth Cellular Corp., a Georgia corporation that owns the stock of BellSouth Mobility Inc and American Cellular Communications, companies which construct and operate cellular systems throughout the United States, participated with BSC in the preparation of these Comments. These entities, together with BST and BSC, are collectively referred to as BellSouth.

3 Communications Assistance for Law Enforcement Act, CC Docket No. 97-213, *Notice of Proposed Rulemaking* (October 10, 1997) ("NPRM").

4 NPRM at ¶ 1, App. A at § 64.1700. The rules will be codified at 47 C.F.R. §§ 64.1700-1705.

of "telecommunications carrier."[5] The Commission should not adopt its proposed rules regarding carrier records[6] and compliance statements.[7] The carrier records rule would impose excessive, unwarranted, and inefficient costs and liabilities on telecommunications carriers in contravention of the purposes of both CALEA and the Communications Act of 1934, as amended. The compliance filing/certification rule makes an unwarranted distinction between large and small carriers.

BACKGROUND

The Commission, in setting forth the history of CALEA and its legislative antecedents, correctly emphasizes Congress' balance of three important policies: (1) preservation of a narrowly focused capability for law enforcement agencies to carry out properly authorized electronic surveillance; (2) privacy protection in the face of increasingly powerful and personally revealing technologies utilized in the provision of telecommunications services; and (3) not impeding the development of new communications services and technologies.[8] The Commission correctly recognizes that Congress has required that electronic surveillances conducted by law enforcement must not violate Constitutional protections against unreasonable searches and seizures,[9] nor unduly interfere with the technological development of the telecommunications industry.[10]

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5 The Commission proposed CALEA-specific definitions of the terms "Telecommunications Carrier," "Information Services," "Appropriate Legal Authorization," "Appropriate Carrier Authorization," and "Third Party." *Id.*, App. A. at §§ 64.1701, 64.1702.

6 *Id.* at § 64.1704.

7 *Id.* at § 64.1705.

8 *Id.* at ¶ 5.

9 *Id.* at ¶¶ 2, 7.

10 *Id.* at ¶ 8.

BellSouth's experience with the important policy issues that are balanced in CALEA are threefold. First, BellSouth has a long history of cooperation with local, state, and federal law enforcement agencies, including the Federal Bureau of Investigation (FBI), in facilitating the electronic surveillance of criminal suspects pursuant to appropriate statutory authorization. Second, BellSouth has long had a policy of preserving and protecting its customers' privacy interests above and beyond regulatory restrictions on the use of certain customer or subscriber information. Third, BellSouth is constantly engaged in the process of developing and bringing innovative services and technologies to market. Indeed, the pro-competitive deregulatory national framework erected in the Telecommunications Act of 1996 was specifically designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.[11] The freedom to innovate is critical to BellSouth's ability to succeed in the competitive marketplace.

In light of its long experience in cooperating with law enforcement, in protecting its customers' privacy, and in developing and marketing innovative telecommunications services and technologies, BellSouth has been an active participant in the FBI's efforts to implement CALEA, both individually and through organizations such as the United States Telephone Association (USTA), the Cellular Telecommunications Industry Association (CTIA), and the Personal Communications Industry Association (PCIA).[12] BellSouth has also been active in the work of

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[11] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

[12] In addition to numerous meetings with the FBI's Telecommunications Industry Liaison Unit (TILU), BellSouth has filed written comments in response to the FBI's Initial Capacity Notice (Jan. 16, 1996) and Second Capacity Notice (Feb. 13, 1997); the FBI's Electronic Surveillance Interface Memorandum (May 30, 1996); Carrier Statement--Notice of Information Collection (June 7, 1996); Cost Recovery (July 9, 1996, additional comments to Office of

industry fora and standards setting bodies to address critical CALEA compliance issues, including the work of the Telecommunications Industry Association (TIA).

The Commission states that "it would be inappropriate at this time for us to address technical capability standards issues"[13] and that "it is not clear whether requests for extension of time of the Section 103 [October 25, 1998] compliance date will be forthcoming."[14] BellSouth is confident the record in this proceeding will demonstrate that current uncertainty concerning CALEA capacity and assistance capability requirements effectively precludes uniform nationwide or even substantial or partial compliance for all carriers with CALEA Section 103 in less than 45 weeks.[15] The Commission's immediate concern should be confirming the recently adopted industry standard as quickly as possible,[16] encouraging the FBI to complete its final capacity notice proceeding, and taking whatever steps are necessary (including a recommendation to Congress) to extend the effective date for industry compliance with the assistance capability requirements to a realistic and appropriate time.[17] Such actions are essential if law enforcement is

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Management and Budget filed December 9, 1996); FBI Draft Cooperative Agreement (August 23, 1996); and Definition of Significant Upgrades/Major Modifications (Dec. 18, 1996).

[13] NPRM at ¶ 44.

[14] *Id.* at ¶ 50. *But see In the Matter of Implementation of Section 103 of the Communications Assistance for Law Enforcement Act,* CTIA Petition for Rulemaking (Jul. 16, 1997) ("CTIA Petition") (recommending postponement of the Section 103 compliance date until two years after adoption of industry consensus document as technical standard).

[15] *See* Memorandum from the Hon. Bill McCollum, Chair, Judiciary Committee-Subcommittee on Crime, to Members of the Subcommittee on Crime, *Hearing on the Implementation of the Communications Assistance for Law Enforcement Act of 1997* (October 17, 1997) ("In actuality, however, it is doubtful that the two and one-half month lead time in the statute (after CALEA's enactment and prior to the date cutting off eligibility for reimbursement) would have been sufficient even if all parties agreed on a standard at the time CALEA was enacted, given the way the industry actually deploys new equipment.") at 9.

[16] TIA/Committee T1 J-STD-025. *See infra* note 54.

[17] Members of Congress have expressed their displeasure over the delays in the standards process and the role played in that delay by units of the FBI. *See* Letter from the Hon. Bob Barr to the Hon. Louis J. Freeh, *In re Booz-Allen & Hamilton Consulting on CALEA* (July 25, 1997).

to receive the capabilities required by CALEA in an orderly, timely, and cost-effective fashion. In the meantime, BellSouth responds to the specific issues and proposed rules contained in the current NPRM in the sequence in which they are set forth therein.

I. RESELLERS SHOULD BE INCLUDED IN CALEA'S DEFINITION OF TELECOMMUNICATIONS CARRIER.

The Commission has concluded that: (1) Section 601(c)(1) of the 1996 Act establishes that CALEA's definitions of a "telecommunications carrier" and "information service" were not modified by the 1996 Act;[18] (2) "common carriers" for purposes of the Communications Act (including commercial mobile radio service providers, and cable operators and electric or other utilities to the extent that they provide telecommunications services) are telecommunications carriers that are subject to CALEA, but pay telephone providers are not;[19] and (3) Congress gave the Commission the flexibility to include persons or entities that provide a replacement for local exchange service in a manner that does not fit neatly into the current definition of telecommunications carrier.[20] These conclusions appear reasonable, particularly since the Commission has made it clear in its proposed rules that "the definitions included in this subpart shall be used solely for the purpose of implementing CALEA's requirements."[21]

The Commission seeks comment on the extent to which resellers should be included in CALEA's definition of "telecommunications carrier."[22] The Commission should clarify that resellers are subject to CALEA in its proposed list of examples of entities subject to CALEA compliance requirements. If the subject of a CALEA-compliant legal authorization for electronic

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18 NPRM at ¶ 15.

19 *Id.* at ¶ 16.

20 *Id.* at ¶ 17.

21 *Id.* at App. A, § 64.1701.

22 *Id.* at ¶ 17.

surveillance purchases telecommunications services from a reseller, she is the customer of the reseller and not the carrier providing the underlying network facilities. Customer information relevant to the subscriber is under the direction and control of the reselling carrier. Moreover, resellers are free to build their own facilities at any time, or to provide service utilizing hybrid resale/facilities arrangements. Appropriate legal authorizations under CALEA must therefore be served both upon the reselling carrier, and, to the extent necessary, the underlying facilities-based carrier.

The Commission concludes that providers of exclusively information services are excluded from CALEA's requirements, but that calling features associated with telephone service are classified as telecommunications services for the purposes of CALEA, and that carriers offering these services are therefore required to make all necessary network modifications to comply with CALEA.[23] While this may be an appropriate reading of CALEA's legislative history, the legislative history also underscores important limitations on the requirement to provide call-identifying information and to deploy assistance capability features:

> The FBI Director testified that the legislation was intended to preserve the status quo, that it was intended to provide law enforcement no more and no less access to information than it had in the past. The Committee urges against overbroad interpretation of the requirements. The legislation gives industry, in consultation with law enforcement and subject to review by the FCC, a key role in developing the technical requirements and standards that will allow implementation of the requirements. The Committee expects industry, law enforcement and the FCC to narrowly interpret the requirements.[24]

Thus, CALEA requires that a carrier's introduction of new technologies and services in the form of calling features such as call forwarding, call waiting, or voice mail not frustrate law

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[23] *Id.* at ¶ 20. These services include call forwarding, call waiting, three-way calling, speed dialing, and the call redirection portion of voice mail. *Id.*

[24] H.R. Rep. No. 103-827, 103d Cong., 2d Sess., Pt.1, at 22-23 (1994).

enforcement's ability to access the type of information to which it had access prior to the advent of such services if such a requirement is reasonably achievable. However, CALEA does not impose an obligation to provide access to any more information, or to modify or retrofit calling features to provide more information than what was required in the past. Moreover, the Commission must clarify that any retrofitting or other modifications or offering of such calling features are subject to reimbursement under CALEA's statutory cost recovery and "reasonably achievable" requirements.[25]

Finally, the Commission requests comments on its authority under CALEA to exempt carriers from the statute's obligations, or to add additional carriers. In the absence of any specific examples, competitive neutrality requires fair and evenhanded treatment. Although Congress gave the FCC the power to exempt, that power should be used sparingly, and only on a clear showing that such an exemption would be in the public interest and fair to non-exempt carriers. On the other hand, when "pure" information service providers (as that term is used for CALEA implementation) begin offering telecommunications services to the public, and in general begin holding themselves out as providers of common carrier services, the Commission should require CALEA compliance.[26]

II. TELECOMMUNICATIONS CARRIERS SHOULD BE PERMITTED TO USE THEIR EXISTING SECURITY POLICIES AND PROCEDURES TO THE MAXIMUM EXTENT POSSIBLE

BellSouth has been assisting law enforcement agencies with court-ordered electronic surveillances for as long as such agencies have been able to obtain court orders to obtain lawful

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[25] 47 U.S.C. § 1008.

[26] BellSouth therefore supports the Commission's proposal to include within the definition of telecommunications carrier for the purposes of CALEA any entity that holds itself out to serve the public indiscriminately in the provision of a telecommunications service. NPRM at ¶ 16.

surveillance. Since then, BellSouth has successfully handled thousands of such surveillances without incident.[27] In its Initial Regulatory Flexibility Analysis (IRFA), the Commission states that "by providing general guidance regarding the conduct of carrier personnel and the content of records in this NPRM, the Commission permits telecommunications carriers to use their existing practices to the maximum extent possible."[28] BellSouth's existing practices are sufficient, and those portions of the Commission's rules imposing additional requirements are unwarranted.

A. The Commission Must Not Expand The Scope Of Carrier Liability Under CALEA

The Commission's proposed rule regarding interception requirements and restrictions states:

> An employee or officer of a telecommunications carrier shall assist in intercepting and disclosing to a third party a wire, oral, or electronic communication or shall provide access to call-identifying information only upon receiving a court order or other lawful authorization.[29]

BellSouth understands the scope of the term "other lawful authorization," as used § 64.1703 to be coextensive with the definition of "Appropriate Legal Authorization" as proposed in § 64.1702(c).[30]

Having established the foregoing rule, the violation of which will subject telecommunications carriers to potential penalties for noncompliance under CALEA,[31] the

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27 Indeed, the FBI's own nationwide studies indicate that problems with electronic surveillance have been *de minimis*. Between 1992 and 1994, the FBI conducted a series of surveys of federal, state, and local law enforcement agencies and found just 183 technology-based problems out of the tens of thousand of surveillances conducted. H.R. Rep. No. 103-827, 103d Cong., 2d Sess., Pt.1, at 14-15.

28 NPRM at ¶ 74.

29 *Id.* at App. A, § 64.1703.

30 *Id.*

31 47 U.S.C. § 229(d).

Commission need not and should not act further on its tentative conclusions concerning the duties imposed upon carriers by Section 105 of CALEA.[32] The statute grants no private right of action; it is superfluous for the Commission to announce a general duty of care when it has promulgated a specific rule to implement Section 105. As the Commission notes, the United States Code already provides criminal penalties and civil remedies, respectively, against persons convicted of conducting illegal wire or electronic communications interceptions.[33] It is simply not this agency's province to interpret Title 18 of the United States Code, when the Commission was established by Congress to "execute and enforce the provisions" of the Communications Act of 1934.[34]

Moreover, the Commission cannot and should not attempt to create new forms of criminal or civil liability, vicarious or otherwise, in the absence of any specific grant of authority from Congress. It is the duty of the United States Congress, in the first instance, to establish appropriate norms of conduct in the statutes of the United States, as well as criminal liability, if Congress deems it appropriate, for the violation of those norms.[35] In the case of CALEA, Congress has already established liability for violations of the Commission's rules implementing CALEA.[36] In addition to CALEA's penalty provisions, there are other adequate legal incentives, including the federal sentencing guidelines, for carriers to be in compliance with federal wiretap law requirements.

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32 NPRM at ¶ 26.

33 *Id.* at ¶ 27.

34 47 U.S.C. § 151.

35 U.S. Const., art. I.

36 47 U.S.C. § 229(d).

The Commission seeks comment on whether a Commission rule that requires carriers to report all illegal wiretapping and compromises of the confidentiality of the interception to the Commission and/or the affected law enforcement agency or agencies, would modify or perhaps mitigate the carrier's liability under the United States criminal code.[37] The Commission, however, proposes no such rule in its NPRM. The scope of such a rule (all illegal wiretapping and compromises of confidentiality)[38] appears to be beyond the scope of the Commission's proposed regulation (electronic surveillance undertaken without appropriate legal authorization). If, for the sake of argument, there was a potential for vicarious carrier civil or criminal liability, then a carrier's report of a rogue employee's conduct ought to, at a minimum, modify or mitigate the carrier's liability. The report, dealing with a potential criminal matter, should not be made to the FCC, but rather to the appropriate law enforcement agency. In any event, the extent of carrier liability for violations of the Commission's rules implementing CALEA have already been established by Congress at 47 U.S.C. § 229(d); the Commission has no statutory authority to create additional liability.

B. The Commission Should Not Adopt Extensive Recordkeeping and Retention Requirements

BellSouth concurs with the Commission's proposed definition of "Appropriate Legal Authorization."[39] In addition, although the Commission has not promulgated the text of the proposed rule referred to in paragraph 29 of the NPRM, it is reasonable to require that carriers state in their internal policies and procedures that carrier personnel must receive a court order, or

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[37] It is the duty of the United States Attorney General, and not the Federal Communications Commission, to determine whether there may be criminal liability resulting from an alleged violation of Title 18.

[38] It is not clear whether the Commission intends to reach "all compromises" or only "illegal compromises."

[39] NPRM at App. A, § 64.1702(c).

other appropriate legal authorization, prior to assisting law enforcement officials in the implementation of electronic surveillance. BellSouth is not opposed to listing the exigent circumstances found at 18 U.S.C. § 2518(7) in its policies and procedures.

BellSouth agrees that it is sound practice for carriers to designate specific employees, officers or both to assist law enforcement officials in the implementation of lawful interceptions. However, a rule that requires carriers to include in their internal policies and procedures a statement that only designated employees or officers may participate in lawful interception assistance activities, while well-intentioned, is unnecessary.[40] BST, for example, employs internal Security Department Specialists whose responsibilities as a point-of-contact for law enforcement agencies seeking court ordered surveillances are outlined in their written job descriptions. Carriers have ample incentive to adopt measures to prevent disclosure.

In addition to Security Department Specialists, however, there are BST employees in other departments who must obtain some knowledge on a limited, need-to-know basis, of the particular intercepts they handle. BellSouth is opposed to any rule that requires these non-point-of-contact individuals to be "designated." Such a designation would be overly burdensome, since employees such as network technicians, business office representatives, and others are geographically dispersed and BST has no way of knowing in advance where or when intercepts will occur and which employees need to be involved in assistance efforts. The Commission's proposed rule would potentially require BellSouth to "designate" every network technician. In addition, there should be no further recordkeeping requirements established for this employee category. Currently, no "intercept" special files or records are maintained by them, and the

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[40] *Id.* at ¶ 30.

separate files maintained by the Security Department Specialists are sufficient for electronic surveillance compliance purposes.

If a rule requiring designation is adopted, BellSouth agrees that non-designated employees should be permitted to effectuate lawful electronic surveillance work, provided that they do so unknowingly as part of routine work assignments.[41] Because BST's Security Department Specialists already maintain confidential files on each court-ordered surveillance,[42] BellSouth does not oppose the Commission's proposal that carriers be required to create separate records, to the extent such records are reasonable and efficient, are permitted by law, and that their retention period is left up to individual carriers. Such records can, of course, be provided to law enforcement upon a reasonable request and pursuant to any appropriate legal authority.

BellSouth is strongly opposed to the Commission's elaborate and overbroad affidavit and recordkeeping proposals. They are redundant and inefficient. They appear to be designed to establish, on behalf of the requesting law enforcement agency and without compensation to the carrier, an elaborate procedural foundation for the admissibility of evidence in a court of law. Such evidentiary assistance is not required by CALEA. Although the Commission states that the proposed rules, "in conjunction with the significant liability prescribed in the statute for unauthorized interceptions, will give carrier personnel sufficient incentive to assist only authorized intercepts, and will, therefore protect users of telecommunications services against unauthorized invasion of privacy,"[43] the Commission has made no finding that any problem exists today with carriers' current policies and procedures, or that carriers lack sufficient incentive to comply with

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41 *Id.*

42 Because of the requirements of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 *et seq.*, BST does not maintain records of FISA surveillances.

43 NPRM at ¶ 32.

existing law. Indeed, the Commission expressly states in its IRFA that telecommunications carriers who have been subjected to demands from law enforcement personnel to provide lawful interceptions already have in place practices for proper employee conduct and recordkeeping.[44] Moreover, the Commission has properly determined that carriers should be permitted to use these existing practices "to the maximum extent possible."[45]

The specific requirements actually proposed by the Commission are simply unnecessary. The sanctions contained in Title 18 and the Company's own policies provide for protection of its customers' privacy and its good faith desire to assist law enforcement, as well as its sense of corporate compliance and ethics, have operated to create a cooperative and trouble-free environment. BellSouth has procedures and policies in place. These existing practices are capable of verification by the Commission pursuant to its authority under § 229(c) of CALEA. Adoption of the requirements set forth in proposed Rule 1704 is unnecessary and will only impose additional burdens and unwarranted liabilities on carriers and their personnel.

The Commission should not require carriers to create and maintain an official list of all personnel designated by the carriers to effectuate lawful interceptions, including, as proposed by the Commission, personal identifying information such as date and place of birth, Social Security number, contact telephone, and pager numbers.[46] In the first place, the "official list" would be impossible to maintain, unless a statement to the effect that "all employees with a need to know" are deemed by the Commission to be compliant with the designation requirement. As stated before, BellSouth simply has no way of knowing in advance of any particular intercept which

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44 *Id.* at ¶ 74.

45 *Id.*

46 *Id.* at ¶ 33.

employees, in addition to Security Department Specialists, will need to have some knowledge of an authorized electronic surveillance in order to assist law enforcement.

Second, there is no useful purpose served for the public or the industry in requiring carriers to disclose, as the Commission proposes, personally sensitive information, ironically in the name of protecting privacy rights. The only possible useful purpose gained from such information is to provide law enforcement with the ability to perform background checks on individuals without adherence to normal processes. CALEA imposes no such assistance requirement on carriers, who should retain the authority to manage their own operations and supervise their own employees.

C. The Commission Should Not Differentiate Between Large And Small Carriers For The Purpose Of Monitoring CALEA Compliance

BellSouth is opposed to the Commission's proposal to differentiate between carriers, based on size, for the purpose of determining who must submit their CALEA security and recordkeeping polices to the Commission for review.[47] The proposal has no basis in law or logic. The statute makes no such distinction, nor does it expressly authorize the Commission to make any such distinction. As the Commission notes, it is primarily the smaller and newer telecommunications carriers who may be least able to meet CALEA requirements.[48] It is logically in the public interest that the Commission review small carrier plans with priority, given the excellent track record to date of larger carriers in complying with electronic surveillance requirements. In fact, if any class of carrier were to be accorded the privilege of filing a certification of compliance in lieu of actual policies and procedures, it would be the class

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47 *Id.* at ¶¶ 34-38, App. A. at § 64.1705.

48 *Id.* at ¶ 36.

comprised of the largest local exchange carriers and their affiliates that deliver more than 90% of the total dialing equipment minutes each year.[49]

Moreover, to the extent that larger carriers handle most of the nation's electronic intercepts, their costs will be much higher than those of smaller carriers. Simply put, the costs of CALEA compliance will vary in proportion to the number of assistance requests received. In light of the absence of any record evidence of the costs of compliance for smaller carriers, and the absence of statutory authorization for such a rule, it would be arbitrary for the Commission to establish one. The Commission, therefore, should treat all carriers alike with respect to CALEA reporting requirements. If it determines that carriers need only require a certification of compliance at the option of the carrier, then all carriers should be given the option. If it determines that it will assess sanctions or other penalties against carriers who violate record reporting requirements, then it should uniformly assess such sanctions and penalties against all carriers who violate the Commission's rules.

III. THE COMMISSION SHOULD ACT ON, AND GRANT, THE PENDING CTIA PETITION

The Commission concludes that, pursuant to Section 301(a) of CALEA, it has the authority to establish technical standards for the purpose of allowing carriers to comply with CALEA's Section 103 capability requirements.[50] It appears the Commission believes that it has such authority independent of its Section 107 authority to establish technical standards if either industry or standard-setting organizations fail to issue requirements, or if a government agency or any other person believes that any standards are insufficient.[51] The Commission also notes that

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49 *Id.* at ¶ 34.

50 *Id.* at ¶ 43.

51 47 U.S.C. § 1006(b).

TIA has been working to develop a technical standard for nearly three years, that this effort has included participation by law enforcement and industry, and concludes that it would be inappropriate at this time to address technical capability standards issues.[52]

The CALEA compliance implementation deadline is October 25, 1998. The FBI has not yet issued its final capacity notice. The Commission has the mandatory duty, under CALEA Section 301, to prescribe such rules as are necessary to implement CALEA.[53] The CTIA Petition requests the Commission to promulgate by rule the industry consensus standard as the final assistance capability requirement and to postpone the CALEA Section 103 implementation deadline.[54] Despite the recent publication of a safe harbor interim standard that clearly constitutes the current appropriate industry standard for CALEA implementation, anticipated non-industry opposition to the standard will likely delay its adoption as a final standard. Given the need for certainty and an efficient and cost-effective implementation of CALEA, BellSouth encourages the Commission to act immediately upon CTIA's petition, granting the extension requested therein.

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52 NPRM at ¶ 44.

53 47 U.S.C. § 229(a).

54 *See supra* note 14; NPRM ¶ 44. Since the CTIA Petition was filed, and after the NPRM issued, TIA and Committee T1, sponsored by the Alliance for Telecommunications Industry Solutions (ATIS), jointly published interim standard/trial use standard J-STD-025, *Lawfully Authorized Electronic Surveillance,* on December 5, 1997. J-STD-025 is an interim industry standard that defines the services and features to support lawfully authorized electronic surveillance and the interfaces to deliver intercepted communications and call-identifying information to a law enforcement agency when authorized. Although not a final technical industry standard, the Commission must clarify that compliance with J-STD-025 satisfies the "safe harbor" provisions of Section 107 of CALEA. *TIA and ATIS Publish Lawfully Authorized Electronic Surveillance Industry Standard,* News Release, Dec. 5, 1997, at 1 <http://www.tiaonline.org/pub/97-96.html>.

IV. THE COMMISSION SHOULD LOOK FAVORABLY ON SECTION 109 PETITIONS

The Commission requests comment on the specific factors contained in Section 109(b)(1)(a)-(j) and the extent to which the Commission should consider specific factors when determining if compliance with CALEA's assistance capability requirements is reasonably achievable, as well as comment on what additional factors the Commission should consider in determining whether compliance with CALEA's assistance capability requirements is reasonably achievable, and why.[55] BellSouth believes that each of the statutory factors is critical, and, consistent with CALEA's overall careful balance of law enforcement, personal privacy, and telecommunications carrier interests, each are to be given equal weight and consideration.

However, it makes no sense to separate CALEA's assistance capability requirements from its carrier capacity requirements. As of the date of these comments, the FBI has not yet issued its final capacity requirements, and there is likely to be some uncertainty resulting from anticipated non-industry opposition to the recently published interim trial standard J-STD-025. Accordingly, the Commission should consider these two additional factors. The Commission should therefore look favorably on all Section 109 petitions, and approve any such petitions that are filed prior to the effective date of the FBI's final capacity notice. Compelling non-standard implementation will only threaten, and not ensure, the continued ability of law enforcement to achieve relatively trouble-free electronic surveillance. Such implementation may jeopardize the privacy of communications, and lead to inefficient, potentially redundant and wasteful expenditures on the part of carriers. None of these results is consistent with CALEA's purposes.

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[55] NPRM at ¶ 48.

The Commission should consider the impact of CALEA compliance on all telecommunications services, not just basic residential service. To the extent the Commission would not otherwise consider the impact of compliance on both the availability and rates of features and services over and above basic residential services, this should also be a factor given equal weight in the Commission's "reasonably achievable" analysis. CALEA was not intended to impede the rapid deployment of innovative telecommunications technologies the Communications Act was designed to encourage, including the full range of features and services beyond basic residential services. It would therefore be consistent with CALEA for the Commission to consider these costs and their impact on the availability of non-basic residential or non-residential services of carriers. The Commission could appropriately include such an analysis as part of a showing under CALEA Sections 109(b)(1)(E), (F), (G), (H) or (I), or it could deem such an analysis to be an additional factor under Section 109(b)(1)(K).

V. THE COMMISSION SHOULD TAKE ALL STEPS NECESSARY TO EXTEND THE SECTION 103 COMPLIANCE DATE

The Commission proposes to permit carriers to petition the Commission for an extension of time under Section 107, on the basis of the criteria specified in Section 109, to determine whether it is "reasonably achievable" for the petitioning carrier to comply with the Section 103 assistance capability requirements by the October 25, 1998 implementation deadline.[56] The Commission can and should do so. Although the Commission states that "it is not clear whether requests for extension of time of the Section 103 compliance date will be forthcoming,"[57] it is reasonable, if not prudent, to expect, in light of the pending CTIA petition, likely opposition to the safe harbor standard recently adopted by the industry, the failure of the FBI to issue its final

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56 *Id.* at ¶ 50.

57 *Id. But see* CTIA Petition, note 14, *supra.*

capacity notice, and the apparent insufficiency of appropriated federal funds that many such requests will be forthcoming, either from individual carriers or from associations acting on behalf of their constituent members. The Commission can and should avoid the administrative burdens that will be borne by carriers in preparing such petitions, and imposed on Commission staff in acting upon them, by granting the relief requested in the CTIA petition, and specifically extending the Section 103 implementation deadline.[58] Sufficient time must be permitted for manufacturers and vendors to develop, adequately test, and install the necessary carrier features to allow carrier compliance.

CONCLUSION

BellSouth has a long and successful record of cooperating with law enforcement in obtaining court-ordered electronic surveillances and in protecting its network subscriber's privacy interests. It has in place policies and procedures which assure compliance with all relevant federal laws pertaining to electronic surveillance. There is no demonstrated need in this proceeding, nor does CALEA mandate that the Commission create additional administrative burdens on BellSouth or any carrier for their assistance roles in the execution of a lawful electronic surveillance. Creating burdensome records creation and retention requirements, and additional carrier liabilities, is inimical to the deregulatory intent of the Telecommunications Act of 1996 and is simply unnecessary to implement CALEA. Accordingly, the Commission should adopt proposed rules 64.1700, 1701, 1702, and 1703. It should clarify that "resellers" are included in the definition of "telecommunications carrier," and that the term "other legal authorization" under 1703 is coextensive with the definition of "Appropriate Legal Authorization" in 1702(c). It should not

[58] The Commission should also make clear that carriers are still free to seek an extension of the new Section 103 implementation deadline upon a showing of the requisite Section 109 factors.

adopt proposed rule 64.1704 which contains unnecessary and redundant requirements. Rather, pursuant to its authority under § 229(b), the Commission should, as it states in its Initial Regulatory Flexibility Analysis, promulgate a rule that provides general guidance regarding the conduct of carrier personnel and the content of records, and permitting telecommunications carriers to use their existing practices to the maximum extent possible. It should not adopt proposed rule 64.1705. The Commission cannot and should not create separate obligations for different classifications of carriers with respect to compliance statement; rather, it should adopt the same reporting or certification requirement for all carriers. Most importantly, the Commission must take whatever steps are necessary to confirm the industry-developed safe harbor standard and to extend the October 25, 1998 assistance capability compliance date.

Respectfully submitted,

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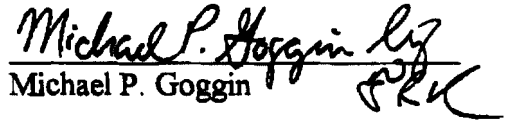
By: 
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CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of December, 1997, served all parties to this action with a copy of the foregoing **COMMENTS** by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties listed hereinbelow.

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